

DEC 21 2005**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS****NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS****FOR THE NINTH CIRCUIT**

MALACHI P. KENNEY,

Plaintiff - Appellant,

v.

PETER PIPER, INC.,

Defendant - Appellee.

No. 04-15681

D.C. No. CV-02-00594-SMM

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge, Presiding

Argued and Submitted December 7, 2005
San Francisco, California

Before: TROTT, T.G. NELSON, and PAEZ, Circuit Judges.

Appellant Malachi Kenney appeals the district court's order granting summary judgment to Peter Piper, Inc. ("PPI") based on Kenney's failure to raise a genuine issue of material fact regarding pretext. Kenney brought suit against his former employer for failure to promote and wrongful termination under the Age

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* We affirm in part; reverse in part and remand.

A district court's grant of summary judgment is reviewed *de novo*. *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004). "This Court has set a high standard for the granting of summary judgment in employment discrimination cases."

Schnidrig v. Columbia Machine, Inc., 80 F.3d 1406, 1410 (9th Cir. 1996).

Kenney argues that he was terminated based on his age. To evaluate Kenney's age discrimination claim, we use the analytical framework developed in *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). We agree with the district court that Kenney established a *prima facie* case of discrimination and that PPI proffered a legitimate non-discriminatory reason for his termination. The district court determined, however, that Kenney failed to raise a genuine issue of material fact regarding the issue of whether PPI's reason for firing Kenney was a pretext for age discrimination. We disagree. Kenney offered both direct and circumstantial evidence of pretext which, when considered in total, was sufficient to raise a genuine issue of material fact regarding pretext. *See Chuang v. Univ. of Cal. Davis, Bd of Trs.*, 225 F.3d 1115, 1127 (9th Cir. 2000). Accordingly, we reverse the grant of summary judgment on this claim.

Kenney also argues that he was not promoted to the position of Regional Manager on the basis of his age. The *McDonnell-Douglas* framework also applies to this claim. Kenney failed to raise a genuine issue of material fact concerning pretext. Although Kenney claims that he was more qualified than the employee who received the promotion, the promoted employee was undoubtedly qualified and ranked higher than Kenney in important performance measures. Because there was no showing that Kenney was denied the promotion on the basis of his age, the district court properly granted summary judgment on this claim.

AFFIRMED in part; REVERSED in part, and REMANDED. Appellant Kenney shall recover his costs on appeal.